

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
United States Department of Justice, Federal)	RM -10865
Bureau of Investigation and Drug Enforcement)	
Administration)	
)	
Joint Petition for Rulemaking to Resolve Various)	
Outstanding Issues Concerning the Implementation)	
Of the Communications Assistance for Law)	
Enforcement Act)	
_____)	

**COMMENTS
OF THE
UNITED STATES TELECOM ASSOCIATION**

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SUMMARY

Law Enforcement's Petition for declaratory ruling and rulemaking asks the Federal Communications Commission ("FCC") to consider numerous issues involving the Communications Assistance for Law Enforcement Act ("CALEA"). Law Enforcement asks the FCC to answer the following questions: whether the CALEA definition of telecommunications carrier is broader in scope than the Communications Act's definition and whether broadband access services and broadband telephony services are subject to CALEA; whether the FCC should adopt rules that provide for the easy and rapid identification of future CALEA-covered services and entities; whether benchmarks and deadlines for CALEA compliance should be adopted; and who should bear the financial burden of CALEA implementation for post-January 1, 1995 communications equipment, facilities and services.

USTA submits that the FCC should not consider Law Enforcement's request for a declaratory ruling, but rather should institute a rulemaking proceeding, in accordance with the Administrative Procedure Act, regarding this complex and far-reaching issue that will have major implications upon the development and deployment of future technologies. Law Enforcement's proposal that future technologies must be CALEA compliant upon entering the market is contrary to CALEA and will suppress future technologies from entering the marketplace. Law Enforcement's request for further benchmarks and deadlines under CALEA is unnecessary, as the statute and the wiretap laws provide the needed authority for extensions of time, reasonable achievability and enforcement. Carriers cannot begin to become CALEA compliant until an industry standard is final and Law Enforcement's deadlines do not reflect this fact. Finally, CALEA implementation costs should not be borne exclusively by carriers and consumers.

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COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (“USTA”),¹ submits its comments through the undersigned and pursuant to the Federal Communications Commission’s (“FCC’s or Commission’s”) Public Notice² seeking comment on the Joint Petition for Expedited Rulemaking (“Petition”) of the Federal Bureau of Investigation, U.S. Department of Justice, and U.S. Drug Enforcement Administration (collectively, “Law Enforcement”).

INTRODUCTION & BACKGROUND

USTA agrees that lawful electronic surveillance is a vital component of Law Enforcement’s efforts to secure the nation from terrorism and other criminal activity. USTA also concurs that electronic surveillance under the Communications Assistance for Law Enforcement

¹ USTA is the Nation’s oldest trade organization for the local exchange carrier industry. USTA’s carrier members provide a full array of voice, data and video services over wireline and wireless networks.

² See Public Notice, Comment Sought on CALEA Petition for Rulemaking, RM-10865, DA No. 04-700 (Mar. 12, 2004) (Public Notice).

Act (“CALEA”)³ “is an indispensable tool used in investigating crime, including terrorism”⁴ particularly in light of the events of September 11, 2001. Because of the critical role that local exchange carriers play in the nation's communications infrastructure, USTA member companies are committed to working with Law Enforcement to safeguard the United States. Additionally, Law Enforcement has worked closely with local exchange carriers to conduct legally authorized wiretaps and electronic surveillance. Every year, local exchange carriers have cooperated with Law Enforcement in the successful implementation of a large number of intercepts on the networks owned and operated by USTA members. It is in the spirit of this historical cooperation that USTA files these comments.

On March 10, 2004, Law Enforcement filed its Petition, requesting that the FCC make a declaratory ruling and initiate an expedited rulemaking proceeding to resolve numerous outstanding CALEA implementation issues. Law Enforcement’s Petition proposes a number of dramatic changes in the classification of services and procedures relating to new technologies, the setting of benchmarks and deadlines for compliance, penalties, and allocations of costs. While Law Enforcement’s proposals deserve serious and prompt attention, many of these requests are counter to the intent of Congress which, in enacting CALEA, was careful to balance the needs of Law Enforcement with other important public interest factors, such as the need not to impede technological progress and to avoid imposing unreasonable costs on carriers and consumers. In addition, the classification proposals made by Law Enforcement deal with highly complex service offerings and rapidly changing technologies which require the type of full factual record that a rulemaking proceeding would provide, prior to the making of any determination.

³ Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as 47 U.S. §§ 1001-10 and 47 U.S.C. § 229)

⁴ See Implementation of Section 104 of the Communications Assistance for Law Enforcement Act, 68 Fed. Reg. 69112 (Dec. 5, 2003) (Remand Notice).

DISCUSSION

I. The Service Classifications Sought by Law Enforcement Should Only Be Decided on the Basis of a Full Factual Record.

Law Enforcement asks the FCC to “issue a Declaratory Ruling or other formal Commission statement, and ultimately adopt rules, finding that, because the CALEA definition of ‘telecommunications carrier’ is different from and broader than the Communications Act definition of the term, CALEA applies to two closely related packet-mode services that are rapidly growing in significance for law enforcement: broadband access service and broadband telephony service.”⁵ Therefore, the basic question to be addressed in this proceeding is which services and entities are subject to CALEA.

The relief requested by Law Enforcement is ill-suited for a declaratory ruling because of the complexity of both the classification definitions established by Congress for CALEA, which may differ from those of the Communications Act of 1934, as amended (“the Act”), and of the rapidly changing technologies that provide broadband services. To make the requested determination, a full and factual record is required. Therefore, the determinations sought by Law Enforcement, which would encompass substantial changes to the existing coverage contemplated by the Commission’s present CALEA rules, require a rulemaking proceeding to comply with the Administrative Procedure Act (“APA”).

The Commission may not issue new rules via a declaratory ruling. Rules can only be made or amended through the process set forth in section 553 of the APA.⁶ “Underlying these principles is a distinction between rulemaking and a clarification of an existing rule. Whereas a clarification may be embodied in an interpretive rule that is exempt from notice and comment requirements, new rules that work substantive changes in prior regulations are subject to the

⁵ See Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act, RM-10865, at 15 (filed Mar. 10, 2004).

APA's procedures.”⁷ Any change to the Commission's rules must adhere to the rulemaking standards of the APA and if not, will be set aside.⁸ On an issue as complex and potentially far-reaching as Law Enforcement's Petition, the FCC cannot proceed without the development of a factual record.

For instance, Law Enforcement urges the FCC to interpret section 102(8)(B)(ii) of CALEA⁹ to find that broadband access and telephony services are “a replacement for a substantial portion of the local telephone exchange service” and that “extending CALEA coverage is in the public interest.”¹⁰ To determine whether a service has substantially replaced local exchange service, the FCC needs to examine market data, penetration rates, and coverage areas, for example. And even if the Commission does determine that a service is a substantial replacement, the Commission still must determine if it is in the public interest to extend CALEA's reach. Such decisions cannot be made in a conceptual vacuum; they require fact specific data for each entity or service. Only through a complete record can the FCC make a fully-informed decision.

II. Technological Challenges of Packet-Switched Networks Further Complicate the FCC's Task

Even after the FCC makes a finding on the record defining what services are covered by CALEA, it faces an even more daunting task in determining how CALEA obligations will apply to packet mode technologies. The complexity of this issue alone is reason enough to deny Law Enforcement's request for a declaratory ruling and to proceed to a rulemaking on a factual

⁶ 5 U.S.C. § 553(c).

⁷ See *Sprint v. FCC*, 315 F.3d 369, 371 (D.C. Cir. 2003)(citing *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992).

⁸ *Id.*

⁹ 47 U.S.C. § 1001(8)(B)(ii).

¹⁰ Law Enforcement Petition at 13.

record. Unlike circuit switched technologies, packet switching will require greater access to many different parts of the telecommunications network depending upon the service and the provider in question. The Commission must take these differences into account when determining the scope of CALEA obligations, and must tailor the obligation to the particular service or provider. We note that this is in stark contrast to circuit switched networks, where Law Enforcement can obtain all of the data it needs from a central office where the wire tap was served.

A. Issues Involving Broadband Access

Even if the Commission, for argument's sake, determines that a particular broadband access service is subject to CALEA, the FCC must then determine the scope of CALEA obligations. CALEA obligations apply only to those "communications [that] are in a carrier's control [and] will depend on the design of the service or feature at issue, which this legislation does not purport to dictate."¹¹ Therefore, the information that a local exchange carrier has access to may well vary from one provider to another based upon the design of network architecture, facilities used and applications involved. In some cases, for example, when USTA members are simply providing the transport service and not the application, Law Enforcement must work with both the carrier and the service provider to discern call-identifying information and other content data.

B. Issues Involving Broadband Telephony

For broadband telephony, USTA refers the Commission back to its IP-Enabled Services proceeding regarding the generic use of the term VoIP.¹² Network architectures differ among VoIP providers. Therefore a factual record is needed to determine the scope of the CALEA obligations of each service provider based upon its role. Law Enforcement has noted as much:

¹¹ House Report No. 103-827, 1994 USCCAN 3489 at 3502 (October 4, 1994).

“Given its myriad forms, the strict delineation of CALEA’s application to other forms of broadband telephony service and other business models would be most appropriately addressed after a full assessment of all comments filed in this proceeding.”¹³ As with broadband access service, CALEA obligations applicable to a broadband telephony provider must reflect the services actually offered by the entity in question. The Commission must sort out which obligations will be applicable to the service provider, and not to the underlying transport provider. Once again, this is the type of decision that can be made only on the basis of a full factual record as would be provided in a rulemaking proceeding.

Moreover, the Commission should develop a record to assist in its definition of broadband telephony services. Law Enforcement’s Petition defines broadband telephony as “the transmission or switching of voice communications using broadband facilities.”¹⁴ This is an overreaching definition that could easily apply to advanced services far from traditional telephony, such as peer to peer communications. Just as the FCC is contemplating and seeking comment on the definition of VoIP in the IP-enabled services NPRM, the same must be done in this proceeding after proper notice and comment.

III. Law Enforcement’s Proposals for Future Services Are Contrary to the Intent of CALEA and Would Stifle Technological Innovation

Law Enforcement asks that the FCC “establish rules that provide for the easy and rapid identification of future CALEA-covered services and entities.”¹⁵ Law Enforcement argues that such rules should provide:

- (1) a service that directly competes against a service already deemed to be covered by CALEA is presumptively covered by CALEA pursuant to

¹² Notice of Proposed Rulemaking, *IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28 at para. 13, n.7 (March 10, 2004).

¹³ Petition at 17, n.39.

¹⁴ *Id.* at 16.

¹⁵ *Id.* at 33.

section 102(8)(A) of CALEA; (2) if an entity is engaged in providing wire or electronic communication switching or transmission service to the public for a fee, the entity is also presumptively covered by CALEA pursuant to section 102(8)(A) of CALEA; and (3) a service currently provided using any packet-mode technology and covered by CALEA that subsequently is provided using a different technology will presumptively continue to be covered by CALEA.¹⁶

Law Enforcement also asks the FCC to require any carrier that believes that any of its current or planned equipment, facilities, or services are not subject to CALEA to immediately file a petition for clarification with the FCC to determine its CALEA obligations.

Obviously, carriers that provide services that come under the CALEA umbrella and have an industry standard allowing lawful electronic surveillance should comply with CALEA.

However, what Law Enforcement seeks for new technologies or technologies that do not have an industry standard to provide the CALEA capability is financially, administratively, and technologically burdensome and directly contrary to the requirements of section 107(b)(4).¹⁷

Law Enforcement's Petition would require carriers to bear the financial burden and build all new voice technologies to comply with CALEA or bear the administrative burden of filing a petition at the FCC seeking a determination that CALEA does not apply. To impose such an obligation, Congress must first agree to such a change to section 107.¹⁸

Section 107(b)(4) requires that CALEA not thwart, but rather "encourage the provision of new technologies and services to the public." The CALEA legislative history emphasized "the goal of ensuring that the telecommunications industry was not hindered in the rapid development and deployment of the new services and technologies that continue to benefit and revolutionize

¹⁶ *Id.*

¹⁷ 47 U.S.C. § 1006(b)(4).

¹⁸ 47 U.S.C. § 1006.

society.”¹⁹ Moreover, “law enforcement may not dictate system design features and may not bar introduction of new features and technologies.”²⁰

The effect of granting Law Enforcement’s Petition would be potentially disastrous on the advancement and deployment of new technologies. Staying ahead in the world-wide race to develop new technologies is vital to maintaining United States security in the long term. The President of the United States recently stressed the importance of widespread deployment of broadband, stating that “the role of government is to create an environment in which the entrepreneurial spirit is strong,”²¹ allowing for private investment and innovative new services for all Americans.²² Ironically, overreacting in attempts to control the deployment of new technologies may actually undermine the Administration’s goals.

In sum, what Law Enforcement seeks is for carriers to bear the technological obligation to become CALEA compliant even in the absence of an industry standard. That is not what section 107 of CALEA requires. As Law Enforcement correctly points out, manufacturers rely on industry standards to develop CALEA compliant solutions. USTA member companies are the customers of those manufacturers that develop solutions in coordination with Law Enforcement. The standards-setting process is well-established within the industry and should not be cavalierly discarded, especially in light of its successful application in the development of interim J-STD-025(b) for packet mode technologies.

¹⁹ See CALEA, Order on Remand, at ¶ 126 (Apr. 11, 2002) (citing House Report No. 103-827, at 3493.

²⁰ *Id.*

²¹ Speech by President George W. Bush, Albuquerque, NM., (Mar. 26, 2004).

²² *Id.*

IV. Law Enforcement’s Proposals for Benchmarks and Deadlines to Achieve CALEA Compliance Are Unwieldy and Contrary to the Act

Law Enforcement’s Petition asks the FCC to establish benchmarks and deadlines for CALEA packet-mode compliance and for future technologies. The Petition also seeks rules to permit the Commission to request information regarding CALEA compliance and to establish rules to aid in enforcement of non-compliance. We believe that Law Enforcement’s request is unnecessary, as CALEA and Title III already provide the needed authority for extensions of time, reasonable achievability and enforcement.

Because the development of standards and implementing technologies is inherently uncertain, sections 107 and 109 provide for extensions of time for CALEA compliance as appropriate.²³ Sections 107 and 109 provide requirements for relief-deficiency petitions under section 107(b), compliance extensions under 107(c), and reasonably achievable petitions under section 109(b). Compliance petitions filed under section 107(c) serve a separate and distinct function from those prescribed under sections 107(b) and 109(b). Under section 107(c) of CALEA, a carrier is permitted to file a petition with the FCC for an extension of time of the section 103 assistance capability compliance deadline. Section 107(c) expressly provides that “a telecommunications carrier proposing to install or deploy . . . any equipment, facility, or service prior to the effective date of section [103] may petition the Commission for 1 or more extensions of the deadline for complying with the assistance capability requirements under section [103].”²⁴

Section 107(c) establishes grounds pursuant to which the FCC may grant a compliance extension. The Commission may authorize a compliance extension, under section 107(c), if it determines that compliance “is not reasonably achievable through application of technology available within the compliance period.”²⁵ It follows logically, however, that in making such a

²³ 47 U.S.C. § 1006; 47 U.S.C. § 1008.

²⁴ 47 U.S.C. § 1006(c)(1).

²⁵ 47 U.S.C. § 1006(c)(2).

determination, the FCC must also consider whether an available technology could be reasonably deployed or installed by the compliance date. The FCC must consult with the Attorney General prior to deciding whether to grant an extension of time. By contrast, section 107(b) is limited to situations where an industry-adopted standard fails to satisfy the capability requirements of section 103, or does not exist; whereas section 109(b) addresses whether compliance with publicly available requirements or standards is unduly burdensome due to exorbitant costs, technical complexity, or both.

The Commission should not set deadlines for compliance with standards until a standard has been developed and agreed upon by the industry as compatible with the appropriate technologies and facilities of carrier networks. In the meantime, as shown above, section 107(c) provides the requisite procedures and timeframes for extensions of time. In addition, Law Enforcement is well aware that the industry has recently finished work on a packet mode standard, interim J-STD-025(b). Thus, barring any difficulties, manufacturers will build to this solution, thereby allowing the FCC to grant extensions for compliance under its section 107(c) authority because technology is still becoming available. The FCC can grant carrier extensions without the need for cumbersome and administratively burdensome benchmarks.

Conversely, Law Enforcement seeks deadlines that would require a carrier within six months of the *Public Notice*, “to commit to either an intercept standard published by a standard-setting body pursuant to CALEA section 107 or a *bona fide* intercept standard established by the carrier and its manufacturer(s).”²⁶ By no means is this within a carriers’ control. Rather, the industry standards body must first adopt a final J-STD-025(b), before deadlines can be instituted. Until adoption of a standard, manufacturers cannot develop CALEA solutions. Any timeline that the FCC would require must take into account the standards process, the manufacturers build time, and carrier implementation of the CALEA solution.

²⁶ Law Enforcement Petition at 43-44.

Law Enforcement claims that the CALEA implementation process is not working because there is no specific, concrete implementation and compliance deadline. However, delays in implementation are more or less a by-product of Law Enforcement's attempts to expand the coverage of CALEA packet-mode by issuing separate needs documents outside of the industry standards process. These documents go well beyond the intended scope of CALEA and have exacerbated the uncertainty over packet-mode CALEA.

Finally, Law Enforcement requests that the FCC impose and codify implementation deadlines and benchmarks modeled after E911 to phase-in CALEA packet mode compliance. Unfortunately, based on the actual experience of implementation of E911, it is likely that such an approach would be administratively burdensome to both the FCC and carriers. Moreover, the need for CALEA-compliant packet mode technology throughout the United States has not been established.

V. The Request for New Enforcement Rules Is Unnecessary and Redundant

Law Enforcement asks the FCC to establish rules that specifically outline the enforcement actions that may be taken against non-compliant carriers, manufacturers, and support service providers. The Petition relies on section 229(a) of the Act to establish such rules for CALEA compliance and asks the FCC to model the rules after the E911 enforcement deadlines. USTA contends that there is no need for such rules to monitor and enforce CALEA compliance because the FCC already has adequate enforcement provisions and penalties to handle non-compliance.

Law Enforcement has failed to demonstrate why additional rules and penalties are necessary. A carrier is deemed to be in compliance with CALEA's section 103 assistance capability requirements, unless it has sought an extension of time under section 107(c) or has petitioned the FCC under section 109(b)'s reasonably achievable standard. Upon receipt of a

lawful court order, a carrier must provide electronic surveillance. A carrier in violation of the court authorized electronic surveillance can be fined \$10,000 a day.²⁷ This penalty demonstrates that the FCC need not impose new CALEA regulatory compliance burdens or enforcement actions directed at carriers because the law already contains very specific penalties directed at carriers.

Finally, the FCC should carefully consider any redefinition of CALEA coverage since Law Enforcement has made its enforcement intentions clear. If anything, the FCC should declare a moratorium on CALEA enforcement actions for any redefined packet-mode capabilities until the carriers have had a reasonable opportunity to comply.

VI. CALEA Implementation Costs Should Not Be the Sole Responsibility of Carriers and Consumers

Law Enforcement attempts to put the entire financial burden of the enhanced CALEA compliance it seeks on carriers and their customers. But such indifference to the financial impact on carriers and consumers does not comport with CALEA. Under CALEA, “if the Commission finds that industry-established technical standards are deficient, it may establish standards that ‘meet the assistance capability requirements of section 103 by cost-effective methods.’”²⁸ The costs associated with CALEA compliance should be imposed in a “cost effective” manner. We agree with the FCC that “effective” means that it accomplishes a task in an efficient manner.²⁹ Therefore, costs associated with post-January 1, 1995 CALEA compliance should be recovered in the least intrusive and most effective way possible.

Permitting carriers to recover their costs from end user customers is only one alternative that the FCC should consider in determining how to recover carrier costs associated with

²⁷ 18 U.S.C. § 2522(c).

²⁸ See CALEA Order on Remand (citing 47 U.S.C. § 1006(b)(1)).

²⁹ *Id.* at ¶ 58.

CALEA implementation. Since Law Enforcement is also a customer, carriers should be allowed to recover their costs from the cost causer, not an uninvolved third party customer. Finally, we encourage Law Enforcement to seek Congressional assistance in obtaining the funds necessary for future CALEA compliance.

A. Cost Recovery Via End User Consumer

Law Enforcement seeks rules that would place all CALEA development and implementation costs on carriers and their end-user customers for post-January 1, 1995 communications equipment, facilities, and services. This is clearly contrary to the intent of CALEA. Section 107(b)(3) requires the FCC “to minimize the cost of such compliance” on consumers.³⁰ The legislative history supports this view and directs the FCC to pay attention to “the impact on rates for basic residential telephone service”³¹ The FCC previously determined that the “costs borne by the carriers and passed through to customers, . . . would be significantly diluted on an individual residential ratepayer” because the costs are spread across a large residential rate base.³² This may have been true when implementing the pre-January 1, 1995 CALEA assistance capability requirements, but it would not be true for post-January 1, 1995 because Law Enforcement has stated that it is unable to pay manufacturers for 90 percent or more of the software upgrades.³³ Thus, the potential costs that carriers would have to pass on to consumers may be substantial, and the law requires that the FCC consider this factor in determining how costs will be recovered for CALEA compliance.

³⁰ 47 U.S.C. § 1006 (b)(3).

³¹ See CALEA Order on Remand ¶ 62 (citing 140 Cong. Rec. H10773-02, 10780 (daily ed. October 4, 1994)(statement of Rep. Markey)).

³² *Id.* at ¶ 65.

³³ *Id.* at ¶ 60.

B. Recouping CALEA Compliance Costs from Law Enforcement

In the CALEA Order on Remand, the FCC permitted carriers to recover the costs of their CALEA software and hardware by charging law enforcement for each electronic surveillance order authorized by CALEA.³⁴ The fee that carriers recover may include capital costs, “as well as recovery of the specific costs associated with each order.”³⁵ We believe that the FCC should not thwart this approach. However, setting an actual fee could be problematic for some carriers due to the low number of surveillance requests and differences in carrier platforms.

C. The Need for Congress to Appropriate Additional CALEA Funds

USTA encourages Law Enforcement to seek additional funds from Congress to pay for packet-mode CALEA on post-January 1, 1995 communications, equipment and services. CALEA costs for post-January 1, 1995 technologies are far-reaching and should not be borne exclusively by a carrier or its customers. The costs of complying with post-1995 requirements are significant and foisting them solely on carriers to be recovered through their customers would be particularly burdensome to consumers. Congress can and should assist in CALEA implementation by providing sufficient funds to carriers and/or manufacturers to pay for costs associated with post-January 1, 1995 CALEA implementation.

CONCLUSION

For the foregoing reasons, Law Enforcement’s request for a declaratory ruling that broadband access and telephony services are subject to CALEA cannot be granted, but rather requires, at a minimum, a rulemaking proceeding. USTA disagrees with Law Enforcement’s approach for identification of future CALEA covered services because of the chilling effect it would have upon the development and deployment of new technologies. In addition, the

³⁴ *Id.*

³⁵ *Id.*

proposed CALEA benchmarks and deadlines are unwarranted, as the current extension requirements are satisfactory. The FCC also does not need to create new penalties to force CALEA compliance. Finally, the costs associated with CALEA compliance should be recovered in the least intrusive and most effective manner possible and should not be borne exclusively by a carrier or its customers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on April 12, 2004, the aforementioned Comments Of The United States Telecom Association was either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the following parties.

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